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No. 83-1598

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ALEXANDER L. STEVAS,  
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# In the Supreme Court of the United States

October Term, 1983

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WILLIAM C. WISWELL,  
*Petitioner,*

VS.

STATE OF KANSAS,  
*Respondent.*

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## APPENDIX TO PETITIONER'S BRIEF IN REPLY

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THOMAS BROOKS

(Counsel of Record)

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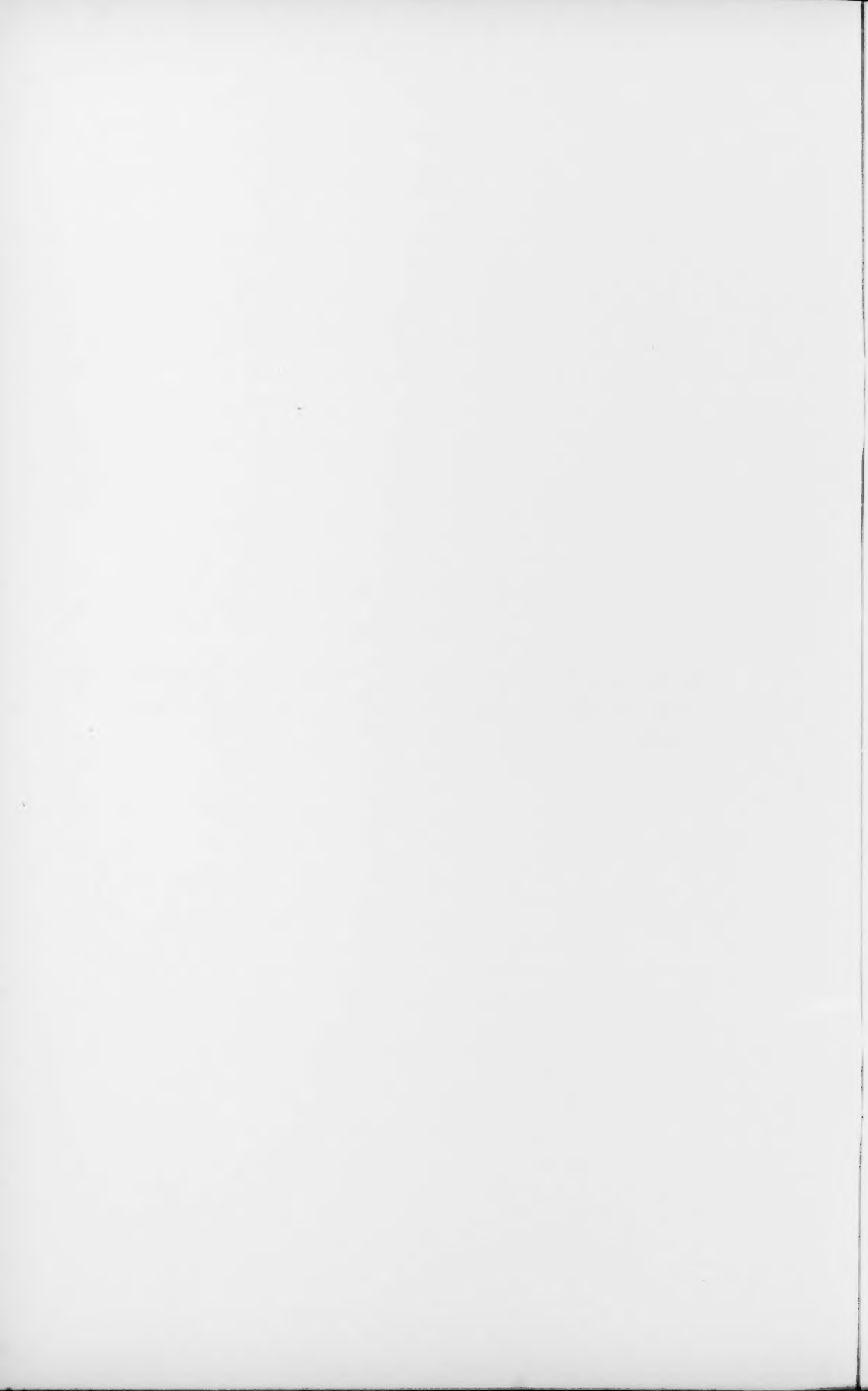
*Attorney for Petitioner*

*William C. Wiswell*

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(Received July 30, 1984)

IN THE DISTRICT COURT OF  
JOHNSON COUNTY, KANSAS  
CRIMINAL COURT DEPARTMENT

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NO. K-40005

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STATE OF KANSAS,  
Plaintiff,

vs.

WILLIAM WISWELL,  
Defendant.

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**FIRST AMENDED MOTION FOR NEW TRIAL  
OR, IN THE ALTERNATIVE, TO  
ARREST JUDGMENT**

COMES NOW the Defendant, by and through his attorney of record, Thomas Brooks, and moves the Court for its Order, pursuant to K.S.A. 22-3501, granting to the Defendant a new trial or, in the alternative, the Defendant moves the Court for its Order, pursuant to K.S.A. 22-3502, for an arrest of the judgment of the jury and in support of this alternative bipartite Motion, states as follows:

## **I. NEWLY DISCOVERED EVIDENCE**

1. Newly discovered evidence containing factual information unknown to either the Defendant or his trial counsel has been uncovered by the Defendant which is of such a credible and highly probative nature that the Defendant states to the Court that had this evidence been adduced by the defense, a different verdict would probably have resulted on April 16, 1982.

The nature and extent of the newly discovered evidence is contained and set forth in the affidavits of the following individuals:

- (a) Rita Faye Harris
- (b) Eddie Schultz
- (c) Victor Schultz
- (d) Larry E. Hale

The affidavits of Rita Faye Harris, Eddie Schultz and Victor Schultz were attached to the initial Motion for New Trial previously filed herein. The affidavit of Larry Hale is attached hereto and incorporated herein by reference.

2. As a separate basis for a new trial or arrest of judgment, the Defendant further states to the Court that the conditions of Defendant's bond [2] as imposed by the Honorable Robert Jones, Associate Judge of the District Court of Johnson County, Kansas, prevented the Defendant from properly investigating his case, properly seeking out witnesses such as those who have given supportive affidavits herein and, therefore, have effectively denied the Defendant herein due process of law as guaranteed to him by the Federal and State Constitutions and amendments thereto.

Had the injunction against witness contact not been imposed, the Defendant herein could have and would have pursued an investigation which might have uncovered the substance of the testimony of these additional witnesses prior to his jury trial of April 12, 1982.

## II. ADEQUACY OF COUNSEL

The Defendant contends that he has a constitutional right to effective counsel under the Sixth Amendment to the U.S. Constitution and further contends that the facts and circumstances surrounding the defense that he was afforded denied him the effective and substantial aid to which he is entitled under the Sixth Amendment and, therefore, deprived him of due process of law under the Fifth and Fourteenth Amendments.

The Defendant specifically contends that his counsel's work schedule, including other substantial trial commitments and state of health, left the Defendant's counsel in such a debilitated physical condition as to cause the following errors, omissions and inadequacies of the Defendant's trial counsel:

A. There was next to no preparation by defense counsel for trial of the captioned matter, instead defense counsel delegated trial preparation to the Defendant who, at best, is not competent to assist in his own defense or anyone else's in felony trial proceedings in this state.

B. There were no pretrial motions or motions in limine regarding subsequent irrelevant, inflammatory and prejudicial evidence which the trial Court was forced to receive because there was no objection to the evidence.

C. There was no pretrial discovery.

D. Defendant's counsel failed to interview any potential witnesses in the case with the lone exception of Vicki Bowman.

[3] E. Next to no pretrial research was considered or completed by the Defendant's counsel and the only research attempted or completed during trial was done by Defendant's secretary and then handed to Defendant's counsel who then read it into the record on the morning of the third (3) day of trial.

F. The Defendant's counsel did not have any prepared questions for any defense witnesses nor any previously prepared cross-examination of any prosecution witnesses.

G. The Defendant's counsel failed to register any objection to damaging, otherwise totally irrelevant and otherwise totally inadmissible trial testimony and trial exhibits throughout the course of the trial.

H. The Defendant's counsel failed to read the one hundred sixteen (116) page court reported statement of the Defendant (inadmissible under Missouri Rules for the reason that it was never read, reviewed, corrected and signed by the Defendant) (Page 114; Line 3 . . . Mr. McCann . . ." This will be typed up. And, as you know, Bill, it must be read and signed by you before a notary.") This one hundred sixteen (116) page statement, which went to the jury for its consideration, contains totally inflammatory, prejudicial, irrelevant and clearly inadmissible matters regarding the Defendant's personal income tax returns for various years in the late 70's and his non-filing of his tax returns. Not only did Defendant's counsel not read the exhibit, but he let the exhibit into evidence without objection and sat at the counsel table during closing argument while the prosecutor harped on

Mr. Wiswell's non-filing of tax returns and made no objection.

I. Defense counsel failed to object to items placed into evidence in Defendant's trial which were taken in the search of the Defendant's premises but not listed on the search warrant.

J. Defense counsel failed to review with the Defendant prior to the Defendant's going on the witness stand, the multitude of documents which would be thrust in front of the Defendant on cross examination all to the Defendant's detriment, i.e., defense counsel failed to properly prepare his client for cross examination.

14] K. The defense counsel ceased questioning John Martin in cross examination prior in time to reaching the threshold of important areas brought out by John Martin which were in conflict with his testimony at preliminary hearing.

L. The defense counsel failed to object to physical evidence in the form of a gasoline can found in an area geographically remote to the property involved in the alleged arson and the gas can was admitted into evidence without objection.

M. Defense counsel failed on redirect examination of Mr. Wiswell to clear up areas brought out by the prosecutor, specifically including the Four Thousand Dollars (\$4,000.00) mentioned in the taped telephone call. The failure on the defense counsel's part to effectively redirect examine his client left the Defendant naked to the jury's scrutiny following effective cross examination by the prosecution.

N. The prosecutor, in connection with the Defendant's prosecution and as a tenacious advocate, continually ham-

mered and hammered and harped upon the Defendant's not filing tax returns, upon photographic evidence and video tapes of the house in question (repeated three (3) times) and was able to emphasize such points which, if not clearly inadmissible because of relevancy or materiality, would be inadmissible on the issue of repetition and redundancy, however, the prosecutor was able to effectively hammer a full can of nails into the Defendant's coffin because there wasn't any objection at any point of the prosecution's closing argument by defense counsel.

O. Notwithstanding the fact that the Defendant supplied defense counsel with necessary information for the interviewing of potential witnesses, no such witness interviewing was undertaken by defense counsel.

P. Defense counsel refused to allow Defendant to bring character witnesses to the witness stand to testify on his behalf relative to his truthfulness and integrity. In this regard, defense counsel refused to allow the Honorable Herbert W. Walton, et al. to testify as character witnesses [5] because the prosecution would then be able to bring up other specific acts claimed perpetrated by the Defendant. (Clearly inadmissible.)

Q. The defense counsel failed to conduct critical voir dire examination as requested by the Defendant.

R. When the Defendant retained defense counsel, the Defendant was unaware of defense counsel's drastically deteriorating state of health. Defense counsel's health and trial commitments were such that defense counsel should have either withdrawn from the Defendant's case or sought assistance in the preparation and presentation of the Defendant's case from another member of his firm.

S. If the Defendant had been afforded effective counsel, much of the State's proffered case never would have

been given to the jury and a different result would likely have occurred<sup>1</sup>.

The Defendant submits that all he is entitled to is a reasonably competent attorney acting as his diligent, conscientious advocate as required by the Sixth Amendment of the U.S. Constitution. The failures on the part of defense counsel, due in large part to defense counsel's health, are such a blatant and serious departure from the standard of care expected from criminal trial counsel in Kansas that it falls far below what might be expected from an ordinary, admittedly human and fallible trial lawyer.

T. Defense counsel otherwise failed to prepare his case for trial and committed other errors during the course of the trial which, taken in the *totality of the representation afforded* (*Schoonover v State*, 218 Kan. 377, 543 P.2d 881, 1975) was less than the representation to which the Defendant is entitled.

### **III. ORDER AGAINST PROSECUTION WITNESS CONTACT BY DEFENSE/GAG ORDER**

Preliminary orders of Judge Gerald Hougland and Judge Robert Jones ordering and directing the Defendant to "have no contact with any witnesses endorsed by state on face of information" (May 14, 1981) and not to "contact, directly or indirectly, or cause to be contacted any of the endorsed (sic) witnesses of State" (May 14, 1981), deprived the Defendant of an opportunity to interview and examine prosecution witnesses in advance of his trial. The [6] Defendant contends that the mandate or gag order by the trial judges mentioned refusing to permit the Defendant to interview State witnesses denied the Defendant a fair trial. In this regard, defense counsel's testimony will reveal the fact that he turned over to the

Defendant the total responsibility of finding and interviewing witnesses and potential witnesses and did no witness investigation or interviewing by himself other than to take the deposition of Vicki Bowman in his office when Vicki Bowman was brought to him by the Defendant. Query: If the Defendant is under a gag order and if the defense counsel turned over a responsibility (which he should not have delegated to the Defendant in the first instance) then who on the defense team was going to interview and investigate the myriad of witnesses listed on the State's initial information and the State's amended information so as to learn what the State's case was all about so as to properly prepare for cross examination of the State's case?

WHEREFORE Defendant prays for the Court's Order, pursuant to K.S.A. 22-3501, granting to the Defendant a new trial or, in the alternative, for the Court's Order, pursuant to K.S.A. 22-3502, for an arrest of the judgment of the jury made and rendered on April 16, 1982.

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By: /s/ Thomas Brooks  
Thomas Brooks

I hereby certify that I hand-delivered a true and correct copy of the foregoing First Amended Motion to Mike Buser, Esq., District Attorney's Office, Johnson County Courthouse, Olathe, KS 66061, this 20th day of May, 1982.

/s/ Thomas Brooks  
Thomas Brooks

